United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1011

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P/S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

-against-

JOSEPH MAGNANO, et al.,
Defendants-Appellants.

On Appeal From The United States District Court For The Southern District Of New York

BRIEF FOR THE APPELLANT RICHARD BOLELLA

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against- Docket No. 76-1011

JOSEPH MAGNANO, et al.,

Appellants.

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BRIEF FOR APPELLANT RICHARD BOLELLA

QUESTIONS PRESENTED

1. Whether the Court erred in denying appellant's motion to acquit on Counts Two and Three prior to submitting the case to the jury.

2. Whether the Court erred in denying appellant's request to read the pre-sentence report prior to the imposition of sentence.

3. Whether the Court erred in allowing into evidence proof of criminal activity not charged in the indictment.

4. Whether the Court erred in denying the appellant's motion for an evidentiary hearing to determine if the verdict should have been set aside and a new trial ordered.

5. Whether the Trial Judge's confusing and misleading charge as to reasonable doubt was prejudicial to the appellant and requires reversal of the judgment.

6. Whether the Court erred in imposing consecutive sentences on the appellant on his conviction for conspiracy and the substantive crime.

PRELIMINARY STATEMENT

Richard Bolella appeals from a judgment of the United States District Court for the Southern District of New York, rendered December 3, 1975, convicting him after a jury trial (Cooper, J.) of conspiracy to distribute a Schedule I narcotic drug controlled substance (18 U.S.C. 846) and distribution of a Schedule I narcotic drug controlled substance, and sentencing him to the care and custody of the Attorney General of the United States for a period of 20 years, followed by 3 years' special parole.

The appellant is currently incarcerated pursuant to that sentence.

STATEMENT OF FACTS

The appellant, Richard Bolella, was tried on a seventeen-count indictment filed on July 10, 1975 charging the appellant and nineteen other named defendants* with conspiring to distribute Schedule I and II narcotic drug controlled substances. The appellant and seven other defendants were charged in three substantive counts with the distribution of a Schedule I narcotic drug controlled substance, heroin.

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* Of the twenty named defendants, two pleaded guilty prior to trial, Gerard Cachoian and Roberto Rivera. The jury was unable to reach a verdict on William Chapman. Two were severed prior to trial, Frank Caravella and St. Julian Harrison. Seven were convicted after (continued next page)

The conspiracy charged in Count One of the indictment lasted from January 1, 1973 to July 10, 1975, and Counts Two and Three were alleged to have occurred in March, 1973, while Count Four allegedly occurred in November, 1973.

THE TRIAL

1. The Prosecution Case

Mario Perna was one of two principal government witnesses.

Perna, a prior federal narcotics offender, testified that in February, 1973, he and Ernest Malizia entered into a partnership, buying and selling Schedule I and II narcotic drug controlled substances.

Perna testified that in March, 1973 he and Malizia visited Johnny Gwynn or Johnny Q, a man who Perna had known for some years (500-03, 506).* The two men saw Gwynn at his apartment at 1065 Jerome Avenue where Gwynn indicated that he was interested in buying heroin and he was told of the quality of the heroin available and its price: $8,000 per 1/4-kilogram, or $15,000 per 1/2-kilogram (504). Gwynn purchased 1/2-kilogram on that first occasion and thereafter Perna and Malizia returned on several occasions (506).

Anthony Verzino was the other principal government witness, and

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(continued from preceding page)
trial: Joseph Magnano, Frank Pallatta, Richard Bolella, Anthony DeLutro, Anthony Soldano, John Gwynn and Frank Lucas. The remaining eight defendants are fugitives: Louis Macchiarola, Michael Carbone, Dominic Tufaro, Frank Ferraro, Carmine Margiasso, Joseph Malizia, Ernest Malizia and Gabriel Rodriguez.

* The numerals in parenthesis refer to the pages of the trial transcript.

he testified that he met John Gwynn when he arrived with, and was introduced by, Perna and Malizia at Gwynn's apartment on Jerome Avenue in the Bronx (1897-98). Verzino also testified to two other occasions when he met Gwynn at this apartment to collect money (1898-1900).

Other customers were also found by the partnership. A man in Hoboken, New Jersey, who Perna had known from prison, Joseph Condella, became a customer and purchased 1/8-kilogram a few days after the pair had received the first two kilograms of heroin from "Skootch" (508-10). Perna and Malizia visited their newly-found customers to collect money and deliver merchandise, as needed. These customers were Cassanova, Joe, Joseph Condella, Johnny Gwynn, and Flaco (511).

Malizia and Perna also met with Frank Pallatta, Dominic Tufaro, and Frank Ferraro at Adventurer's Inn (513-14). At about this time, March of 1973, the suppliers were disappointed that Malizia and Perna could not yet pay for the narcotics delivered, but agreed to give them additional time and other meetings were arranged (514-15). When asked for his telephone number, Frank Pallatta said that he did not do business over the telephone, and that if he had to be reached he could be contacted at a particular social club located on Jerome Avenue and Bedford Park Road in the Bronx. In the event that neither he nor his partners were there, he explained, a message could be left with a man who was always there named Charlie, and whose nickname was "Charlie Chan" (516).

Perna testified that he met with an acquaintance, William Chapman,

"Chappy" at the Oasis Bar in Manhattan (512). At the meeting, Perna asked "Chappy" to introduce any would-be buyers of heroin to him. Chappy acknowledged that he owed favors to Perna and agreed, but indicated that he was not interested in narcotics, and that he preferred not to even discuss it (512-13). Thereafter, Perna received a telephone call from Chapman who said that he wanted to meet at the Outfielder Restaurant in Queens. At the meeting Chapman introduced Perna to "Hollywood Hal" who discussed a narcotics transaction, but declined to purchase because of the poor quality and high price of the heroin available (538-39).

Verzino testified that he met William Chapman some time between September of 1973 and February of 1974, and that he met Chappy at a supermarket parking lot (1900-01). At that time, Chapman asked for and received money from Malizia and Perna in order to open a stationery store. Malizia and Perna continued to deal with old customers as well as with a new customer known as Chino (539).

Perna and Malizia were meeting with Pallatta, Tufaro and Ferraro at the Adventurer's Inn in Yonkers, and paid them $20,000 (540). Perna and Malizia indicated that they would have the balance in a few days and other meetings were scheduled (540, 542). During one of the meetings Malizia asked Pallatta where "Dickie" was and why he was not at any of the meetings (540-41). Pallatta replied that "Dickie" was in Florida and would not return for one to two months (541).

Perna and Malizia met "Chappy" and St. Julian Harrison at a meeting at 153rd Street and Riverside Drive (543). At that meeting, Harrison told them that he was interested in purchasing narcotics. After some bickering over price and quality of the heroin, Harrison agreed to pay $28,000 per kilogram for three kilograms, with payment a few days after delivery (545-46).

Upon securing four more kilograms from Pallatta and Ferraro (547-49), three kilograms were delivered to Harrison (550-52). A few days after the delivery, Harrison told Perna and Malizia that he had problems in court, that he had no money, and that he had talked to Frank Lucas who agreed to take the heroin and pay for it (554). An appointment to meet Frank Lucas was scheduled for the next day (555).

On the following day, Perna and Malizia met Lucas and Harrison (555). Harrison told the men that Lucas would pay $28,000 per kilogram, but Lucas told Perna and Malizia that he would not purchase at that price in the future (558). If the price and quality were improved, however, he said that he would take "all that they could get" (558). A meeting was then arranged when Lucas was to pay for the drugs taken by Harrison (558-59). A few days later, however, Lucas did not have the money and indicated that he needed more time to get it (560). Some days later, Lucas did pay the $56,000 he owed (568-69).

Meanwhile, Perna and Malizia had other meetings with Pallatta, Tufaro, Ferraro and Magnano. Perna and Malizia asked for more time to

pay for the drugs purchased by them, but partial payments were made to Pallatta periodically. They requested lower prices and pure heroin, and were advised that there was a possibility of receiving some in the future but not then.

When they again met with Tufaro, Ferraro and Magnano at the Adventurer's Inn and paid out more money, Perna was told that in the future his cost would be lowered to $22,000 per kilogram from $25,000 (569-71). It was late March or early April, 1973 (572). During this entire period of time Perna and Malizia continued to service their regular customers.

After receiving their price reductions, Perna and Malizia met Lucas and lowered the price to him from $28,000 to $25,000 per kilogram. Lucas ordered five kilograms and asked if they could supply quinine and manita (573-74). Malizia indicated that he may be able to supply manita, but that he could not supply quinine (574). Perna, Malizia and Lucas then exchanged telephone numbers; Lucas told them that he had $30,000 or $40,000 for them, and the meeting broke up (574).

After the meeting with Lucas, Malizia and Perna testified that they met with Pallatta, Tufaro and Ferraro at the Adventurer's Inn and ordered an additional six kilograms of heroin; that they paid $30,000 or $40,000 that they had received from Lucas; and that they arranged a new procedure for receiving heroin in the future (575-77). A few days later, Ferraro delivered the six kilograms which were in a suitcase at a White Castle Restaurant on Boston Road in the Bronx (578). By this time Perna and

Malizia had moved their "stash" from the furnished room on Sheridan Avenue to an apartment on Westervelt Avenue (578). Five kilograms were delivered to Lucas shortly thereafter, in April, and he promised payment within a few days (580).

Perna estimated that from April until August of 1973, he met with Lucas approximately fifteen times, and that Lucas was given heroin on approximately six or seven of those occasions, approximately five kilograms each time (581-83). Perna estimated that he received a total of approximately $800,000 or $900,000 in that same period, and by the beginning of August, 1973, his partnership with Malizia was worth $1,200,000. Furthermore, he testified that from April to August of 1973 he paid approximately $500,000 to Pallatta and his partners at the Adventurer's Inn (627-31, 950).

In addition to heroin, Perna also testified that he supplied Lucas with five kilograms of manita which he purchased from Gerald Cachoian ("Coco") (586-80).

In September, 1973, Perna met Roberto Rivera in Parkchester, Bronx, through Gerard Cachoian. Perna and Malizia knew that Rivera was the partner of one of their customers, Cassanova, and as they had not seen Cassanova for some time, they decided to see Rivera directly (656-57). Rivera told them that he was interested and he ordered two kilograms (658). After delivery Rivera purchased a total of ten more kilograms of heroin which were delivered on four separate occasions (662).

Thereafter in late September or early October, 1973, Perna met with Gerald Cachoian who said that he could obtain pure cocaine (663). The three partners discussed the matter among themselves, and told Frank Lucas about it, who then ordered two kilograms of cocaine and an additional four kilograms of heroin (665). Thereupon two kilograms of cocaine were purchased from Cachoian for $40,000, paid in advance (667-69).

Perna testified that in October, 1973, when he arrived at the Cross County Shopping Center for a meeting, he noticed Verzino's automobile parked in the lot behind Gimbel's (671). Upon approaching it, he saw Malizia and Verzino who were seated inside. At that time, Perna was introduced to Richard Bolella (671). During the conversation, Verzino asked Bolella if he could get a price reduction, and Bolella said that he would talk to his partners and let them know the answer in a few days (672). Perna continued that he asked Bolella where he had been and that he replied he had been in Florida but that he expected to be in the city for a couple of months (672).

Verzino's version of the meeting was somewhat different. He said that in the fall of 1973, he, Perna and Verzino were bringing approximately $92,000 to the Cross County Shopping Center in order to pay Charlie (Chan) and Ferraro (1910-12). Immediately after the delivery of the money, the three partners got into a car with Pallatta, Magnano and Tufaro whereupon Pallatta agreed to reduce the price for heroin in the future by $1,000 per

kilogram (1914). Verzino asked Pallatta if he wanted to buy cocaine and was told that they would let him know. He also testified that he asked about Dick Bolella, whom he had known for most of his life, and was advised that Bolella was fine and was at the Tradewinds Motel (1914-15, 2046). When the meeting broke up, Verzino went with Pallatta and Tufaro to the Tradewinds Motel where he visited with Bolella (1915-16).

The men allegedly talked of many things and during the conversation Bolella allegedly referred to some possible trouble he expected in Florida resulting from a wiretapped conversation with a person named Butchie Mamone (1916). They exchanged phone numbers, but agreed not to call each other unless it was absolutely necessary (1917). Verzino testified that if Bolella were to call and someone else were to answer, Bolella should tell the person to tell Verzino that "Blondie" had called (1918). Additionally, Verzino testified that he asked Bolella about the possibility of purchasing pure heroin and Bolella said that it would be difficult, but that he would try.

Verzino testified that he thereafter met Bolella in January, 1974, after getting a telephone call from "Blondie" (1923, 1927). Bolella told him that he was coming right over, and he came within the hour (1923). Upon arriving, Bolella said that he had received a message through "Charlie Chan" that the police had just missed discovering a ten or twelve kilogram deal that had taken place in Central Avenue near Klein's -- close to where Perna lived (1924). Verzino was told that the person living there, Perna,

was being followed and suggested, therefore, that Perna stop attending meetings and that he take a vacation. He also suggested that the usual meeting place in Cross County Shopping Center in Yonkers be changed to Allerton Avenue in the Bronx (1926-28).

In the course of his testimony concerning that conversation, Verzino referred to an earlier meeting with Bolella, Pallatta and Tufaro at the Cross County Shopping Center, where he inquired about the possibility of purchasing pure narcotics and was told that they could not afford to supply pure heroin. At that time, Verzino testified, he told them that his customers were unable to compete with others who were selling better quality heroin at lower prices on the street (1929). Pallatta said that he could not help it, that they owed a lot of money, that one of their customers had been shot and arrested, and that they were dependent on Malizia, Perna and Verzino to sell all of their narcotics (1930-31). Malizia said that they could not "move" the heroin that fast (1931).

In early November of 1973, Verzino went to a restaurant called Raymond's and met Anthony Delutro ("Tony West"), a man who he had known for "some time" 91931-33). He later testified, over strong objections, that he had previously purchased heroin from Delutro in 1961, 1962 and 1965, many years prior to the formation of the instant conspiracy, in quantities ranging from two to five kilograms per transaction (1993). Verzino and Delutro talked of various things, including mutual friends from prison, and in the course of the conversation, Delutro indicated that "goods" (narcotics) were highly priced, as high as $65,000 per kilogram (1933). Thereafter,

Verzino told his partners of the conversation and they decided to try to purchase pure heroin from "West", agreeing among themselves that they would pay as much as $55,000 per kilogram (1935-36). Accordingly, the next evening Verzino drove his partners to a bar on 30th Street, and then proceeded alone to Raymond's to talk to Delutro (1937).

At Raymond's Verzino and Delutro discussed the possibility of Delutro supplying five kilograms of heroin, and agreed to a price of $50,000 per kilogram (1937). Verzino promised to pay at least $200,000 in advance, and an appointment was made for the next evening (1940). Verzino then rejoined Perna and Malizia and told them of what had been agreed upon (1941). The three partners managed to assemble $234,000, and thereafter Verzino met with "Tony West" again, telling him of exactly how much money was available and the denominations of the currency (1941-42). "West" asked Verzino if there were many small bills and that if there were too many he would be charged commission of 1% for changing them into larger bills (1943). After Verzino assured him that only $3,000 were in ten and twenty dollar bills, and that the rest were in larger denominations, an arrangement was made for Verzino to meet "West" on 29th Street. Verzino was to park on 29th Street between 1st and 2nd Avenues, and when "West" arrived he would stop his car, open the trunk, and Verzino would walk over and drop the money in (1943). The delivery was thereafter made in the planned manner, and immediately thereafter Verzino said that he rejoined his partners in a bar on 30th Street (1944). After about an hour,

Delutro entered the bar and said that there would be a delay, that the narcotics would not arrive until later that nigh., and that it may have to be picked up in Queens (1945, 1947). Perna protested against making the trip, and the partners suggested that the delivery be made the following night in New York instead, and that Delutro keep the money until then (1945, 1947). Accordingly, a meeting was arranged for the following evening at the Hill Cafe on 35th Street (1945). Before leaving the bar, Delutro called a girl, after a request by Malizia, and shortly after the call was made, a girl named Tricia entered the bar and was introduced by Delutro (1945). Verzino testified that he met her several times thereafter with Malizia, Perna, Caravella and James Culhane (1964).

On the next evening at 9 o'clock p.m., Verzino testified that he, Malizia and Perna went to the Hill Cafe (1948), and saw Delutro who told them that the narcotics were in his car, and Verzino got them from the trunk whereupon he told Delutro to "hang around" for at least an hour until Verzino would let him know everything was satisfactory (1948-49). Thereupon, Verzino put the narcotics into his car, got Perna and Malizia from the cafe where they were waiting, and went to the apartment in the Bronx where they weighed and tested the heroin, finding the purity to be satisfactory, but the weight short by approximately eight ounces (1950-53). Verzino testified that the three men then allegedly discussed whether or not to return the narcotics because of the shortage, but decided to keep it despite the problem (1954). Verzino then said that he telephoned Raymond's

Restaurant and spoke to Delutro, telling him that there was a problem that he would discuss when he saw him, but that otherwise everything was all right (1955).

The next evening, Verzino and Perna met Delutro at Raymond's Restaurant and told him of the shortage (1956). After some discussion, Delutro indicated that it could be made up at a future transaction, and he was assured by Perna and Verzino that the $16,000 balance due him would be paid as the narcotics were sold (1956-58). In late November, when the $16,000 was paid, a better price was requested. Delutro allegedly told them that they could get a better price if they were to take a substantially higher quantity (1962).

Perna's testimony referred to a similar purchase from West, but his account of the transaction was different from Verzino's.

Perna testified that at a meeting with Verzino and Malizia at the Golden Gate Restaurant, Malizia told Perna that Verzino had talked to "Tony West" who indicated that he could obtain pure heroin for $50,000 per kilogram (674). He never mentioned, as Verzino testified, about the meetings among the three partners agreeing among themselves to pay West $55,000 per kilogram (1935-36). Perna continued that the three partners decided to pool as much cash as possible in order to buy as much as they could, and according to Perna, they amassed $200,000, not $234,000 as Verzino testified (1941-42), and ordered five kilograms (675). Perna testified that the pure narcotics was delivered but upon testing and weighing it after it had been taken to the "stash" it was ten ounces "short"

in weight (680). He said that a complaint was made to "Tony West" at a subsequent meeting in a bar on 30th Street, in Perna's presence, and it was there that West allegedly said that the shortage would be made up in a future transaction (680-82, 1391).

Perna did not say, as Verzino did, that a telephone call was made by Delutro concerning the complaint, nor did he say there were the series of meetings and delays in delivery described by Verzino, or the meetings with the woman or the leaving of $200,000 with Delutro without receipt of any narcotics (1942-45, 1948-62).

In November of 1973, Malizia and Perna met Pallatta and Magnano at the Cross County Parking Lot, near the John Wanamaker Department Store (756). Malizia asked for fifteen to twenty kilograms but was told by Pallatta that he could not deliver that quantity because of a shortage in supply and because he had another customer who was paying more (757-58). Eventually Pallatta agreed to supply ten kilograms (759-60, 769). A few days later, however, when Ferraro was to make the delivery he told them that he was able to deliver twelve kilograms (770). The heroin was packed in twenty-four one-half kilogram plastic bags, and the price was $22,000 per kilogram (773-75).

This alleged hesitancy to supply narcotics by the Pallatta group, as testified by Perna, is in sharp contrast to the situation as described by Verzino. Firstly, in October of 1973, Verzino testified that Pallatta told

him that his other customer had been arrested and that they were counting on Malizia, Perna and Verzino to sell all of their narcotics, but that Malizia and his partners could not sell it quickly enough (1930-31).

Additionally, subsequent to the purchase of pure heroin by Malizia, Perna and Verzino from Delutro, Verzino testified that he had a conversation with Malizia concerning a Jo Jo "Blinky" Carmalatta who had purchased heroin from a source in the Bronx and had subsequently returned it (1966). Since Malizia and Perna had been receiving numerous complaints, the thought occurred to them that they may have been purchasing unwanted "returns" from Pallatta and his group (1997). Accordingly, in late November, Verzino met Pallatta at the Cross County Center and questioned him about the matter (1998). Pallatta, somewhat equivocally, denied that he had sold them returned merchandise (1999). In the course of the conversation, Verzino mentioned that they had other "goods" (1999). Tufaro, who was with Pallatta, got excited and accused them of selling other suppliers' goods first, thereby explaining why they were "slow", but Verzino denied it, saying that they were keeping the better merchandise as a "nest-egg" in case the complaining customers stopped taking the poor quality heroin (1999-2000).

After obtaining the ten kilograms, there was a meeting in late November with Frank Lucas at the Van Cortlandt Motel in the Bronx (779). An argument between Lucas and Verzino started, and Lucas indicated that he did not want to meet with Verzino in the future, that he wanted to conduct

future business with Perna or Malizia only, but after being told that it was impossible, he agreed to meet Verzino (781-82). At the meeting, Lucas was told of the ten kilograms and displayed interest but insisted that because of competition he needed a better price. Accordingly, he was told that the price would be lowered to $24,000 per kilogram instead of $25,000 (784). Thereafter he agreed to take the ten kilograms and it was delivered (784-85, 788). Lucas assured Perna that he would deliver $200,000 to Verzino in the next few days while Perna and Malizia were to be in Florida (785). As it turned out, Lucas did not pay the money he promised, but only gave Verzino $20,000 (791). Verzino testified that he was not present when the ten kilograms were delivered to Lucas, but he said he was aware of the transaction (1894-95).

In December of 1973, Malizia was arrested (2002). Subsequently, Verzino took the keys to his apartment and emptied it (2002-04). Verzino kept the papers that he found there and he gave the money that he found in the apartment to Malizia's wife (2004).

In either December of 1973 or January of 1974, subsequent to Malizia's arrest, Verzino testified that he met with Perna and Lucas at the Van Cortlandt Motor Hotel (2004). They told Lucas that Ernie had been arrested and that money he owed was needed to pay bills, lawyers, and to post bail for Malizia. Lucas, in turn, complained bitterly of the poor quality heroin that had been supplied to him, and an argument between

he and Verzino ensued (2005-08). Lucas was told that he could purchase pure heroin at $110,000 per kilogram, and he agreed to purchase a three or four ounce sample (2007-08). Subsequently, Perna told Verzino that some of the pure heroin had been delivered to Lucas (2008).

In January of 1974, Verzino testified his customers were paying slowly and moreover he had legal expenses. Consequently, and because he had heard that Perna was under government surveillance, he was attempting to avoid paying Pallatta and he was not meeting Pallatta as regularly scheduled (2009).

On December 18, 1973, Malizia was arrested on a fugitive warrant (795, 2002). Lucas was told of the arrest a few days later (799). According to Perna, after Malizia's arrest Verzino started drinking excessively, missing appointments, alienating customers, and talking excessively in bars. The relationship between the two men deteriorated, and when Perna talked to Verzino about the problem, he denied its existence (799-800). In the beginning of January, 1974, Perna met with Joey Condello at a restaurant in Fort Lee, New Jersey to discuss killing Verzino, and Perna gave Condello a shotgun and a pistol to use (802, 805-06, 824, 966-69). At the meeting, Perna was introduced to a fellow named Jimmy who, it later turned out, was a narcotics agent (803-04). Moreover, when Perna had the conversation with Condello, Condello was secretly tape-recording the conversation (806; Exhibit 78, p. 808).

The government also called Valcocean Littles, a New Jersey

policeman who arrested Ernest Malizia in December of 1973 and who took various personal papers from his person and delivered them to Special Agent James Bradley (1425-27). Special Agent Joseph Brzostowski arrested Mario Perna, Graziano, and Lorenzo on February 1, 1974 and took personal papers from Perna and gave them to Special Agent Bradley (1430-31). He also testified to surveillance of Perna on January 16, 1974 at a Fort Lee diner where he saw Perna talk with Special Agent Bradley who was then working in an undercover capacity (1431-32). After Perna left, he was followed to 1065 Jerome Avenue in the Bronx (1433-34).

Special Agent James Bradley testified to working with an informant, Joseph Condella in 1973 and 1974 and to various negotiations and transactions with Perna and Condella in December, 1973 and January, 1974 (1457-79). Bradley also testified about a request by Perna to murder Verzino and about Perna's supplying firearms, allegedly for that purpose (1479-87).

Special Agent Bradley also testified that when he arrested Perna on February 3, 1974 he had eight kilograms of heroin with him (1488-94; Exhibits 15 and 16). Other records referred to by Officers Littles and Brzostowski, who testified at the trial, were also introduced into evidence through Bradley (1494-95).

Verzino testified that he purchased pure heroin on at least one other occasion, in the fall of 1973 or the early winter of 1974 (2003). Ernie Malizia's brother, Patsy, was to contact a supplier in Queens for them, and notify them through another person, Frankie Caravella, when the drugs

were to be available. This arrangement was made because of fear that one of them may have been a "little hot" (2012).

Sometime later, in January, 1974, Caravella told Verzino that Patsy had gotten in touch with someone and accordingly an appointment was made at a bar in Port Washington called Jimmy's Backyard (2016). Caravella accompanied him to the bar, but when they arrived he was asked to leave (2018). A little while later a man introduced to Verzino as Tony, and identified at the trial as Anthony Soldano, entered the bar (2018). Tony told Verzino that he could supply the heroin at a price of $50,000 per kilogram (2018). When asked how much money he could get, Verzino indicated that he could get at least $75,000, and that he did not want credit. An appointment was thereafter made for the next day (2020-22).

That evening, Verzino met with Perna, Caravella, Ernie Malizia's son, and his brother-in-law at a restaurant in the Bronx (2022-23). Verzino told Perna of his conversation with Tony and they agreed to gather as much money as possible and to meet the following morning on Baxter Street in Manhattan (2024). The next morning they met him with Frank Caravella and Ray Robin. Robin allegedly took Verzino to a nearby bank where he withdrew $25,000 and gave it to him before they rejoined Caravella and Perna (2025).

The men had amassed about $75,000 which they counted and packed while in a motel room where they stopped on the way to Port Washington (2026-28). They thereafter proceeded to Jimmy's Backyard in Port Washington with Caravella and Verzino riding in one car, and Perna

following in another (2029). Before arriving at Jimmy's Backyard, however, Caravella and Perna went into a nearby restaurant to wait (2029). When Verzino arrived, Patsy Malizia was there and as the two men started talking, Tony drove up in a car, got out, and joined the conversation (2029-30). An arrangement to meet in New York was made and Tony was given the money (2032).

Verzino and Caravella drove to New York together and the following evening Tony Soldano was met and after some initial delay, delivered three kilograms of heroin (2036-42). It was tested and found to be pure (2042). As Perna described that transaction in January, 1974, Verzino allegedly told him to collect as much cash as he could because he -- Verzino -- had allegedly talked to a fellow named Tony about purchasing pure heroin for $50,000 per kilogram and that if he could produce $50,000, Tony would provide two kilograms, one on a consignment basis (824-25). Perna also was told that the person, Tony, wanted to meet no one else regardless of whether or not they were his partners (825). Verzino also allegedly told Perna at that time that one of their customers, Ray Robin, would provide the advance money required for the purchase (826-27). The next day, Perna met Verzino and his connection, Frank Caravella, in front of Ray Robin's office after they had secured the money from Robin (830). The purchase was completed by Verzino without the presence of Perna, but that evening Verzino met Perna with the three kilograms of pure heroin that he had allegedly purchased from Tony (834).

On February 1, 1974, Perna went to Fort Lee, New Jersey with

eight kilograms of heroin to sell to Joey Condello (837-38). He was accompanied by two men, Anthony Graziano and Ronald DiLorenzo (838). Verzino was unaware of the proposed sale because Condello and Verzino had had a fight and the latter wanted nothing to do with Condello (838). When he arrived at Fort Lee, Perna was arrested (839). Seized from him were the eight kilograms of heroin as well as some lists showing names and telephone numbers of customers, as well as amounts owed for drugs (848; Exhibit 1, p. 858; Exhibit 2, p. 858; Exhibits 4A, 4B, 4C, p. 869; Exhibit 3, p. 871; Exhibit 6, p. 876; Exhibit 3A, p. 881).

After the arrest, while in custody in West Street, Perna spoke with Malizia and Frank Lucas in May or June of 1974. He told Lucas that he needed money for attorneys and that he owed money. Frank Lucas assured him that arrangements would be made for him and his attorneys to be paid (886-87). Perna also testified that subsequent to his own arrest on February 1, 1974, he learned that Verzino was arrested and was being detained at the "Tombs", the New York Detention House (915-16), while he, Perna, was being detained at West Street together with Malizia (915-16). In approximately August, 1974, Perna and Malizia believed that Verzino had begun to cooperate with the authorities (916). Thereafter, he and Malizia planned an escape which was effectuated on September 22, 1974 (918-19). Perna was recaptured and charged with escape but Malizia is unapprehended (919). Perna admitted that although he had not been in the same institution with Verzino, the government's other principal witness in this case, he had been in contact with him since his arrest on five or six

occasions (994-95; 998; 1009-11).

After Perna's arrest, Verzino testified that he told Caravella that he needed help in his business and offered him a partnership in future profits (2043). After some initial hesitation because he was afraid that he was "hot", he agreed (2044). Thereafter, Caravella was advised of everything that Verzino thought he needed to know, including the names of the customers, and amounts owed, as well as the identities of the suppliers, past and present (2043-44).

According to Verzino's testimony in February of 1974 he paid $67,000 to Soldano in payment for pure heroin purchased shortly before Perna's arrest, by sending it with Caravella to Patsy Malizia (2047).

On February 25, 1974, Verzino was arrested while opening the trunk of Caravella's car, in front of the "stash" apartment on Pelham Parkway (2047, 2051, 2054-55).

Caravella, who was present, was also arrested (2054). Immediately after being placed under custody, the two men were taken by government agents into the "stash" apartment, 4J, at 1147 Pelham Parkway, pursuant to a search warrant. Inside Verzino had twenty-six pounds of heroin, some pistols and various records on his person showing amounts owed and names of customers, all of which were admitted in evidence at the trial (2055-59; Exhibit 40, p. 2055; Exhibit 36, p. 2057; Exhibit 36A, p. 2059; Exhibit 72, p. 2059).

None of the records showed any connection to the appellant, Richard Bolella.

The government called as witnesses Police Officers Clarence Williams, George Taylor, and Joseph Rollo, who assisted in the arrests and search of the "stash" apartment.

Peter Scrocca, a special agent for the Drug Enforcement Administration, testified that he knew Michael Carbone, Joseph Magnano, Frank Pallatta, Richard Bolella, and Anthony Verzino since they were children together in the Bronx (2717-19). Accordingly he testified that he had seen Carbone, Macchiarola, Pallatta, Bolella and Magnano together on numerous occasions over the years, until 1970 when he was transferred to Miami (2719-20).

Over vehement objection by all of defense counsel concerning its relevance, prejudicial value and admissibility, the government was allowed to elicit testimony that on January 28, 1975, one year after the arrest of Verzino, Malizia and Perna, Frank Lucas was arrested at his home in Teaneck, New Jersey. Pursuant to a search of the house which was conducted at that time, $583,730 in United States currency was found (2876-77). The money was introduced into evidence and exhibited to the jury.

THE DEFENDANT'S CASE

John Gwynn and Anthony Delutro testified on their own behalf. Additionally, Mr. Gwynn, and the defendant Frank Lucas, called witnesses who testified for them. None of the witnesses testified to anything directly relating to the appellant, Richard Bolella.

The appellant Richard Bolella called no witnesses nor did he

testify on his own behalf.

The jury, after two days' deliberation, convicted the appellant on Counts One and Four of the indictment. The jury was unable to reach a verdict on Counts Two and Three.

POINT I

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO ACQUIT ON COUNTS TWO AND THREE PRIOR TO SUBMITTING THE CASE TO THE JURY.

The appellant was named as a defendant in four counts of a seventeen count indictment. The first count charged him with conspiring with nineteen other defendants to violate the federal narcotics laws from January 1, 1973 to the date of the filing of the indictment, July 10, 1975. The next three counts, Counts Two, Three and Four, charged the appellant with possessing heroin with the intent to distribute it and the distribution of heroin in March, 1973 in Counts Two and Three, and November, 1973 in Count Four. There was no evidence to establish Richard Bolella's participation, either as an aider and abettor or co-conspirator, in the commission of the crimes charged in Counts Two and Three of the indictment, and their submission to the jury was merely an attempt to provide the jury with numerous counts on which to convict, in the hope that it would convict on one or more counts. This was error. United States v. Harary, 457 F. 2d 471 (2nd Cir. 1972); United Statex ex rel Hetenyi v. Wilkins, 348 F. 2d 844 (2nd Cir. 1965); United States v. Cantone, 426 F. 2d 902 (2nd Cir. 1970).

The evidence at the trial established that, prior to October, 1973, Mario Perna, one of the two main government witnesses, had never seen the appellant, and the only mention that he had heard of the appellant was in the early spring of 1973 when Ernie Malizia asked Frank Pallatta where

"Dickie" was, and Pallatta told him the appellant was in Florida.* Pallatta stated that the appellant had been in Florida for two months and would be there for an additional two months. Anthony Verzino, the government's second principal witness who had been in federal prison from the mid-1960's to August of 1973, testified that prior to October of 1973 he recalled one incident involving the appellant and that was in the early 1960's when he introduced Richard Bolella to one Joe Ragone and they impliedly dealt in contraband narcotics.

The only other testimony that the government produced at the trial linking Richard Bolella to the other co-defendants or co-conspirators was that of Peter Scrocca, who is a Special Agent of the Drug Enforcement Administration. Scrocca, who has been a group supervisor with the DEA in Miami, Florida for the last five years, testified that he had testified that he had known the appellant and co-defendants Pallatta, Magnano, Carbone and Macchiarola since he was a child growing up in the Morrisania section of the Bronx, and that from 1963 to 1970 he had seen Richard Bolella with Frank Pallatta and Joseph Magnano on several occasions, and on several occasions he had seen these three co-defendants together with Michael Carbone and Frank Macchiarola.

There is no evidence of any criminal conspiracy between the appellant and the other indicted co-conspirators prior to October of 1973. Indeed the only evidence that was introduced concerning that period of time,

* A request for a limiting instruction was made at this time by appellant's counsel and denied by the Court.

insofar as Richard Bolella is concerned, shows, at most, a mere association between him and certain other indicted co-defendants, going back to their childhood.

There is no evidence to establish that Richard Bolella aided or abetted in the sales of heroin which form the basis for Counts Two and Three of the indictment. Indeed, there is no proof that he even knew of or approved of these two sales in March, 1973. Moreover, there is no evidence that he was a member of the criminal conspiracy charged in Count One of the indictment in March, 1973, and the Supreme Court in Pinkerton v. United States, 328 U.S. 640 (1946) held that a defendant could only be found guilty of the substantive crimes "if it was found at the time those offenses were committed petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it." Here in fact the only evidence linking the appellant Bolella to the other indicted co-defendants prior to October, 1973 was proof that they had been brought up in the Morrisania section of the Bronx, had been seen together with other indicted co-conspirators on occasion up to the year 1970, and that Pallatta knew that Richard Bolella was in Florida in March, 1973. These facts cannot establish that Bolella was conspiring with any of the indicted co-conspirators in March, 1973. United States v. Cantone, 426 F. 2d 902, 904-05 (2nd Cir. 1970).

This error was compounded by the Court's charge where the Court instructed the jury that:

" A defendant may not know all of the conspirators, yet if he knows there is a conspiracy and if he has knowledge of its basic common objectives and aims and joins it, then he adopts as his own the past and future words and acts of all the other conspirators in furtherance of the conspiracy, as he understands it, even though he may not have been present when the words were said or the acts were done . . . If you find that a conspiracy to distribute heroin existed, that these three(Pallatta, Magnano and Bolella) defendants were members of it, and that the offenses charged in Counts 2, 3 and 4 were actually committed by another member of the same conspiracy, in furtherance of the overall plan, you may find these three defendants guilty of these substantive offenses, even if they were not physically present at the time that the offenses were committed." *

These instructions were erroneous in that they lead the jury to conclude erroneously that Richard Bolella could be held accountable for substantive violations of law committed by members of the conspiracy prior to the time the evidence showed that Bolella first joined the conspiracy charged in October, 1973.

Appellant's counsel specifically moved, at the close of the government's case, for a directed verdict of acquittal on Counts Two and Three of the indictment. The motion was denied. Appellant's counsel further submitted a specific request under the authority of the Pinkerton case, that the Court instruct the jury that they must find that Richard Bolella was a member of the conspiracy charged in Count One of the indictment at the time the substantive violations of law that he was accused of were committed.** This, as the Court's charge clearly shows, was not done.

It was error for the Court to deny appellant's motion to acquit on

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* Pages 4065 - 4066 and 4093 of the transcript.

** A 181

Counts Two and Three of the indictment, an error which was compounded by the Court's failure to properly charge under Pinkerton as requested by counsel. The jury was left to determine the appellant's fate upon an impermissibly broad scope, which is not altered by the fact that the jury was unable to reach a verdict on Counts Two and Three as to Richard Bolella. This impermissible mixing of counts, allowing all of them, whether there was sufficient evidence to sustain them or not, to be submitted to the jury, coupled with the Court's erroneous Pinkerton charge, deprived the appellant of a fair trial.

Our Court of Appeals in United States ex rel Hetenyi v. Wilkins, supra, 348 F. 2d at 866, in deciding a case where the accused at his first trial was convicted of second-degree, in his second trial was found guilty of first-degree murder, and had his third conviction, this time for murder in the second degree, reversed because he was impermissibly charged, although not convicted, of murder in the first degree, said:

> " The mere fact that Hetenyi could have -- logically and legally -- been convicted of second-degree murder on the basis of all the evidence, does not mean that he would have been so convicted if he were not also charged with first-degree murder. For example, it is entirely possible that without the inclusion of the first-degree murder charge, the jury, reflecting a not unfamiliar desire to compromise might have returned a guilty verdict on the first-degree manslaughter charge on the same evidence. There is, of course, no basis for predicting with any confidence, that this would have been the outcome of the third trial if Hetenyi had not been reprosecuted for first-degree murder; but neither is there any basis for predicting with any

> confidence, that this would not have been the outcome. To make this latter prediction on the basis of the sufficiency of the evidence would be to ignore reality and, in effect, to have judges make the choice entrusted to the jury . . . The source of the impropriety does not increase the possibility of prejudice, nor does it alter the ways in which the error could work to the prejudice of the accused."

Five years after the Hetenyi case had been decided by the Court of Appeals for the Second Circuit, the United States Supreme Court in Price v. Georgia, 398 U.S. 323, 331 (1970), in deciding that an accused in a state prosecution could not be re-tried for murder after being convicted of voluntary manslaughter at his first trial, said:

> " Because the petitioner was convicted of the same crime at both the first and second trials, and because he suffered no greater punishment on the subsequent conviction, Georgia submits that the second jeopardy was harmless error when judged by the criteria of Chapman v. California, 386 U.S. 18 (1967) . . . We must reject this contention. The double jeopardy clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary rather than to continue to debate his innocence."

The erroneous submission of a count or counts to a jury will require reversal of a conviction on other counts on which the evidence is sufficient as our Court of Appeals held in United States v. Cantone, supra, 426 F. 2d at 905, where the erroneous submission of a substantive count required

reversal of the conspiracy count, as the jury was improperly influenced by the substantive count.

Moreover, even the fact that there may be evidence that an accused joined a conspiracy after the commission of a substantive count, will not suffice to prevent the reversal of either the conspiracy count or the substantive count.

In United States v. Harary, supra, 457 F. 2d at 479 in dismissing the indictment, Judge Kaufman stated:

> " Those who have labored in the vineyard of litigation are aware that where the case is a hard one for the government, as this was, it will consider its task done if it can secure the advantage of offering the jury a choise -- a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense than to continue the debate."

Here, in the instant case, the jury was having a very difficult time in reaching a verdict as to the appellant Bolella, as witnessed by a compromise that was unquestionably aided by the Court's erroneous Pinkerton instruction to his great detriment. The jury, during deliberations, inquired as to whether the conspiracy had any "pull" over to the substantive counts, and the Court repeated its earlier erroneous Pinkerton instruction to which appellant's counsel objected.*

It is impossible to measure the effect on the jury's verdict of the submission of Counts Two and Three, supported by insufficient evidence

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* A 182-85

and submitted under an erroneous legal theory. Therefore, the judgment of conviction on Counts One and Four should be reversed and a new trial ordered on those counts.

POINT II

THE COURT ERRED IN DENYING APPELLANT'S REQUEST TO READ THE PRE-SENTENCE REPORT PRIOR TO THE IMPOSITION OF SENTENCE.

Several days prior to the imposition of sentence on December 3, 1975, appellant's counsel called the Court's chambers and requested permission to read Richard Bolella's pre-sentence report. This request was denied when originally made and again when it was renewed on the day of sentence. This was error. Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure; Townsend v. Burke, 334 U.S. 736 (1948); United States v. Needier, 472 F. 2d 652 (2nd Cir. 1973); United States v. Brown, 470 F. 2d 285 (2nd Cir. 1972).

Counsel made two requests for an opportunity to see the pre-sentence report prior to the imposition of sentence, even going so far on the first occasion as to cite to the Court's law clerk Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure, but the Court informed counsel, both at the time of the original request and later when the request was renewed on the day of sentence, that the Court's policy was:

> " That we regarded always the reports of the Probation Department to the judge as confidential documents. It has been my invariable practice when I take into consideration some factors that were not revealed upon the trial, or not brought to my attention and to the attention of counsel and the defendant himself, to make mention specifically of those factors so as to give counsel an opportunity, and the defendant, an opportunity to meet what the Court considers is new material called to the attention of the Court. In this case, however, I have already said, and I repeat, I shall bring out the factors which the

Court is considering and only those factors which enter into our deliberations on this sentence . . . and that is the reason I say that I am going to announce just what factors entered into my deliberations, and only those factors that brought about my determination." *

While sentencing the appellant Richard Bolella, the Court referred to his lack of a prior criminal record, his desertion from the United States Army, his satisfactory record while under supervision, and a reference to the appellant's employment as sketchy and unverifiable. When appellant's counsel called to the Court's attention that the appellant's employer was in court, and that Bolella's employment from 1965 through 1974 was substantiated by W-2 income tax withholding forms, the Court then re-examined the reports and stated that the report indicated that appellant had been employed as a used car salesman since 1972 at Park Auto Sales in the Bronx. The Court indicated that the probation department had not been able to verify appellant's prior employment, but that the Court would accept counsel's representation as to appellant's past employment. The Court then made no further comment and proceeded to sentence Richard Bolella to twenty years' imprisonment. * *

In the course of the argument, the government stated that Bolella's past employment record was a sham, but the court stated that it was not considering that statement in imposing sentence. Counsel, however, had no opportunity, and still has had none, to confront and rebut whatever

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* A 186-90
** A 191-95

information was contained in that report. The record is certainly clear that there was misinformation in the pre-sentence report of the appellant and the only way to have allowed appellant to rebut any additional misinformation was to let counsel look at the pre-sentence report and comment on it prior to sentence.

The policy of the trial court not to disclose pre-sentence reports, because it believes them to be confidential, is clearly at variance with the position taken by our Court of Appeals in United States v. Brown, supra, 470 F. 2d at 287, 288. In Brown, the Court of Appeals held that under Rule 32(c)(2) of the Federal Rules of Criminal Procedure, as it existed subsequent to 1966 and prior to December 1, 1975, "the sentencing court may disclose the pre-sentence report. It certainly was intended that the sentencing court exercise its discretion in each case . . . It is equally clear that when a Judge states, as he did here, that in effect his policy is never to disclose pre-sentence reports, that is not an exercise of discretion on an individual basis . . . Discretion under Rule 32(c)(2) must be exercised on a case-by-case basis, not by a blanket policy of non-disclosure . . . Moreover, we have pointed out that the preferable practice, absent circumstances calling for confidentiality, is to disclose to the defendant or his counsel at least the substance of the pre-sentence report."

It is difficult to reconcile the long-standing practice of Judge Cooper with the holding in Brown, which was decided in December, 1972, three years prior to the sentencing in this case. This is clearly not an instance where a newly-enunciated rule has sharply altered the prior practice, for here the procedure that counsel called upon the court to adopt

had been the rule in the Circuit for at least three years.

Defense counsel has very clearly defined responsibilities at sentencing which he must be allowed to exercise to enable his client to enjoy the full panoply of rights consistent with due process of law. The Supreme Court in Townsend v. Burke, supra, 334 U.S. at 740, 741 set down in broad terms, the role of counsel at sentence when it said:

> " Counsel, had any been present, would have been under a duty to prevent the Court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted . . . in this case counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of Court records, a requirement of fair play, which absence of counsel withheld from this prisoner."

Congress in seeking to implement the requirement of fair play at sentence, held that the pre-sentence report shall be turned over to defense counsel prior to sentencing and the reason for this change in Rule 32 was set forth in the advisory committee's note (1975 Amendment) wh.re the committee stated:

> " The advisory committee is of the view that accu. cy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the Court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete pre-sentence reports or the argument that

> sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the Court orders a full hearing."

Rule 32(c)(3)(A) was thus designed to implement to Supreme Court decision in Townsend v. Burke by allowing counsel to have access to the materials upon which the Court will draw for information to serve as a basis for sentence, to prevent the Court from drawing upon a "poisoned well".

It is impossible to list for this Court all the misstatements and inaccuracies contained in the pre-sentence report prepared by the Department of Probation for the appellant Richard Bolella, but the record on sentence makes it clear that as to the appellant Bolella there were inaccuracies in the report, and that Bolella did not receive that degree of consideration from the Court that would amount to fair play.

It cannot be said that the appellant Richard Bolella did not suffer as a result of the procedure followed by the Trial Court at sentencing. Bolella, with no prior criminal record, convicted on two counts out of the four with which he was charged, received a term of imprisonment of twenty years. Whitney North Seymour, Jr., former United States Attorney For The Southern District of New York, in an article that appeared in the New York State Bar Journal* of April, 1973, pointed out that in the period

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* Whitney North Seymour, Jr., New York State Bar Journal, April, 1973 Vol. 45, issue 3, pp. 163-171. A 196-204

of time from May to October, 1972, the average prison sentence for violation of the federal narcotics laws was approximately five and a half years, and many of these cases unquestionably involved sentences imposed for violations of 21 U.S.C. 173, 174, which required, upon conviction, a minimum term of imprisonment for five years. In The Second Circuit Sentencing Study* of the forty-six judges whose responses were incorporated in the study, a white male, with several prior narcotics offenses, charged with the sale of heroin, would have received a sentence of imprisonment of from one to ten years, with the great majority of the judges, thirty-nine to be exact, imposing a sentence of imprisonment of five years or less.

This case should be sent back to the District Court with directions that the pre-sentence report be made available to counsel and after affording counsel and the defendant the opportunity to review the report, the appellant Richard Bolella should be re-sentenced in accordance with the directions of the Court.

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* Anthony Partridge, William B. Eldridge, The Second Circuit Sentencing Study, Federal Judicial Center, August 1974, p. A-11. (A205-206).

POINT III

THE COURT ERRED IN ALLOWING INTO EVIDENCE PROOF OF CRIMINAL ACTIVITY NOT CHARGED IN THE INDICTMENT.

In the course of the trial, the government elicited, over objection, from one of its main witnesses, Anthony Verzino, testimony about criminal conduct by the appellant Richard Bolella and several other co-defendants committed several years prior to the date of the conspiracy harged in the indictment. This w s rror. United States v. DeCicco, 435 F. 2d 478 (2nd Cir. 1970); United States v. Byrd, 352 F. 2d 570 (2nd Cir. 1965).

Anthony Verzino testified that from 1959 to 1966 he bought and sold heroin in multi-kilo lots, dealing with Pallatta, Magnano, Carbone, Macchiarolla and DeLutro, and that he purchased most of his heroin from Pallatta and Magnano in this period of time. He further testified that in 1962 he introduced Pallatta and the appellant Bolella to a "connection" by the name of Joe Ragon , Verzino testified that he introduced Bolella to Ragone one afternoon on a street corner, after Bolella said he wanted to meet the man and later Bolella said "yes" when asked if he had done anything with him. Verzino stated that in early 1960 to 1961 he and Magnano were delivering heroin to a customer of Pallatta's by the name of Frank Ross, heroin that Pallatta received from Jack Bove. Verzino stated he also dealt with Tony DeLutro in that period of time.* In addition to all

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* Pages 1865-1871 of the transcript.

this, Verzino was also permitted to testify that in 1949 Magnano exhibited to him several capsules containing heroin. *

Prior to Verzino's taking the stand, the prosecutor informed the Court and opposing counsel that through this witness the government intended to offer testimony as to prior similar acts against Pallatta, Bolella, Magnano, Delutro and Carbone, and that these acts occurred in the years 1960 to 1965. ** This evidence was received over counsel's objections.

The government, trying to persuade the court to allow in additional testimony of prior similar acts through a witness by the name of Anthony Manfredonia ***, referred to the testimony of prior similar acts by Anthony Verzino in the following terms:

> " It is the government position that Verzino's testimony with respect to prior acts no more prejudiced the jury against the defendants mentioned than his testimony concerning the acts charged in the indictment. This is so because Verzino's credibility with respect to the prior similar acts is no greater than his credibility regarding the crimes charged. If the jury believes Verzino with respect to his testimony on the crimes charged, they will certainly believe his testimony regarding prior similar acts. By the same token, if they disbelieved his testimony on the crimes charged, they will undoubtedly disbelieve his testimony

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* Pages 2574-76 of the transcript.
** Pages 1819-20 of the transcript.
*** Manfredonia did not testify.

regarding prior similar acts. In other words, Verzino's testimony with respect to prior similar acts in no way buttresses his other testimony and, therefore, does not prejudice the defendants one iota more than his testimony regarding the crimes charged." *

Thus, in essence, the government conceded, while they were offering it, that Verzino's testimony as to prior similar acts had no probative value.

In Byrd, supra, 352 F. 2d at 574, 575, our Court of Appeals held that the admission of testimony about prior similar crimes requires a balancing between the probative value of the proferred testimony against its prejudicial character, and said:

> " The probative value is measured by the extent to which the evidence of prior criminal activities, other than a conviction, closely related in time and subject matter, tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal intent or tends to negative the claim that the acts were committed innocently or through mistake or misunderstanding . . . Another factor to be considered is whether the government was faced with a real necessity which required it to offer the evidence in its main case."

In the instant case, the government conceded that Verzino's testimony of prior similar acts had no probative value and thus they did not need it. The prejudice to the appellant becomes crystal clear, for as the Court stated in Byrd, supra, 352 F. 2d at 574:

> " It is generally recognized that there can be no complete assurance that the jury even under

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* A-207

> the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar act, probably committed the one with which he is actually charged . . . . "

The defense in this case, insofar as the appellant Bolella was concerned, was an attack upon the credibility of Mario Perna and Anthony Verzino in an effort to raise a reasonable doubt as to the veracity of their accounts as to what Bolella allegedly said or did.

Here, the testimony of Verzino about prior similar crimes had no probative value, was not closely related in time, separated from the conspiracy charged in Count One by at least seven, and in some instances as long as twenty-four years, and was utilized by the government to prejudice the defendants as witnessed by its remarks on summation where the government stated:

> " We have never disputed in this case from the beginning until now those men are not of a bad background. But who, members of the jury, do major narcotics and heroin salesmen associate with? Who do they associate with? With others of the same ilk. That is why this association is important in this case. Just as Verzino and Perna sold heroin in the past, their association with these other people corroborates the fact that they are of the same ilk, and Verzino and Perna . . . " *

An objection to these closing remarks of the prosecutor was taken and overruled.** The government used the proof of prior similar acts to show guilt by association which was improper. United States v. DeCicco,

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* Pages 3751-52 of the transcript.

** Pages 3752 and 3777 of the transcript.

supra, 435 F. 2d at 483. In a case where the appellant Bolella did not testify or offer any evidence it was error to allow testimony of prior similar acts which had no probative value, but did have substantial prejudicial impact on the jury.

This case should be remanded to the District Court with appropriate directions for a new trial.

POINT IV

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR AN EVIDENTIARY HEARING TO DETERMINE IF THE VERDICT SHOULD HAVE BEEN SET ASIDE AND A NEW TRIAL ORDERED.

On November 11, 1975 the government notified the court and opposing counsel of the existence of three statements made by one of its chief witnesses, Mario Perna, in October, 1974 concerning his escape from the Federal Detention Center on West Street in New York County in September, 1974. The trial, having ended on October 24, 1975, the prosecutor who tried the case, in his response to appellant's motion for a hearing to determine if a new trial should be ordered, stated that he had first learned of the existence of these documents on November 8, 1975, but admitted that they had been in the possession of another Assistant United States Attorney prior to the start of the trial in this case. The District Court denied the appellant Bolella's request for an evidentiary hearing on the failure of the government to turn over these materials. This was error. United States v. Morell, 524 F. 2d 550 (2nd Cir. 1975); United States v. Hilton, 521 F. 2d 164 (2nd Cir. 1975); United States v. Miller, 411 F. 2d 825 (2nd Cir. 1969).

In a letter dated September 5, 1975 (A 208-09), some three weeks prior to the trial itself, the prosecutor notified defense counsel as to the following:

> " Secondly, pursuant to our obligation under Brady v. Maryland, 373 U.S. 83, 104 (1963), and its progeny, we hereby submit the following

information . . . (5) In or about September, 1974 Mario Perna escaped with others from the West Street House of Detention."

The prosecution thus knew prior to trial that this evidence had a high value to the defense as witnessed by his letter of the 5th.

The prosecution, however, did not turn over any material, such as documents or statements since the government viewed its Brady obligation in very narrow, erroneous terms as it stated during the trial:

> " We are not required, as a matter of law when a Brady matter comes up to divulge everything with respect to it . . . We also oppose any motion to obtain the report in which Mr. Verzino misrepresented certain facts, if one exists . . . I don't have the documents here to turn over to these men and we submit we don't have to turn them over." *

While these statements were made by the prosecutor in referring to statements by Anthony Verzino, the other principal government witness, about his knowledge of another conspiracy involving the importation of heroin into the United States, they do set forth the prosecution's views as to his Brady obligations and these views are erroneous. The statements or documents that constitute Brady material must be turned over to defense counsel, as the Supreme Court pointed out in Giles v. Maryland, 386 U.S. 66 (1967) where the Court held that two police reports should have been turned over to defense counsel.

Here, the government by its letter of September 5th in which they said they were making the information concerning Perna's role in the West

* Pages 3429-30, 3432 of the record. (A 210-12)

Street escape available to opposing counsel under Brady, they knew of its high value to the defense and were required to provide opposing counsel with those statements of Perna.

The government on direct examination asked Mario Perna the following question and received the following answer:

> "Q. Subsequent to your recapture, did you agree to cooperate with the government in full?
> A. Yes, sir. *

This question and answer allowed the government in summation to argue that:

> " . . . these people are acting for the first time in their lives, since they began to cooperate, in full, in good faith they are acting, they are telling the truth because they know the truth is the only way out for them." **

Thus the government made great use out of Perna's willingness to cooperate from the outset, or since the date of his recapture in successfully convincing the jury to accept Perna's testimony all the while rejecting defense contentions that Perna was covering up his real sources of heroin. The government knew of the defense contentions concerning the veracity of Perna and Verzino, from the opening remarks of defense counsel, all of whom attacked their credibility and stated that Verzino and Perna sold the government a bill of goods.

Perna's statements of October, 1974 cast a long shadow over the

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* Page 3714 of the transcript.
** Page 2860 of the record. Pages 2854-61 are misnumbered, having been included in the record twice. Page number 2854 follows page number 2861.

prosecutor's claims of Perna's forthrightness. These documents clearly exhibit that Perna lied to government agents in an attempt to mislead them and to avoid implicating certain people, such as family, friends and associates. Perna's deliberate misrepresentations and lies to government agents in regard to the West Street escape should have been brought to the attention of the defense so that they could use this information to impugn his credibility and allow the jury to view the full scope of Perna's truthfulness.

In Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956), Mr. Justice Frankfurther, writing for the Court, said:

> " This Court is charged with supervisory functions in relation to proceedings in the Federal Courts . . . when uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account."

Moreover in our Circuit it has long been the rule that a new trial will be ordered even where the material may only be evidence of impeachment. United States v. Miller, supra, 411 F. 2d at 832.

The statements of government counsel at the trial indicate that he had complete access, not only to the file of his own case, but to the case

files of other assistants, and that some items that the government sought to place into evidence during the trial were discovered by the prosecutor while combing the files of other assistant United States Attorneys.*

It is clear that the prosecutor, even prior to trial, was aware of the high value Perna's escape from West Street would be to the defense, and that the difficulty in turning over to defense counsel certain documents, discoverable under Brady, was not due to the prosecutor's inability to locate them or ignorance of the underlying facts, but rather because of his own erroneous interpretation of Brady v. Maryland, 373 U.S. 83 (1963).

Court should not speculate as to what material may be effectively utilized by the defense. Rosenberg v. United States, 360 U.S. 367, 371 (1959); Kotteakos v. United States, 328 U.S. 750, 765 (1946); United States v. Consolidated Laundries Corporation, 291 F. 2d 563, 569 (2nd Cir. 1961).

In this case, where the defense from the outset was an attack upon the credibility of the two government witnesses, Verzino and Perna, and where there was no substantiation of the accusations uttered by these witnesses against the appellant Bolella from any unimpeachable source such as documents, wiretaps or surveillance, the high value to the defense of this favorable material could not have escaped the prosecutor's attention.

The District Court was in error when it denied appellant's request

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* See page 2917 of the transcript. (A 213)

for an evidentiary hearing to make a determination regarding the government's conduct in this matter and this matter should be remanded to the District Court with directions that such a hearing be held.

POINT V

THE TRIAL JUDGE'S CONFUSING AND MISLEADING CHARGE AS TO REASONABLE DOUBT WAS PREJUDICIAL TO THE APPELLANT AND REQUIRES REVERSAL OF THE JUDGMENT.

The purpose of a court's charge is to correctly and succinctly instruct the jury as to its function which is to determine the facts and apply the law as charged by the court. United States v. Persico, 349 F. 2d 6 (2nd Cir. 1965). In the instant trial, the presiding judge failed to instruct the jury properly with respect to reasonable doubt. When, as in this case, explanations of the term are given which may tend to mislead or confuse a jury, the possibility arises that the jury may find no reasonable doubt when in fact there might be one. In that situation, the charge is erroneous. Holland v. United States, 348 U.S. 121, 140 (1954); Bollenbach v. United States, 326 U.S. 607 (1946); United States v. Persico, 349 F. 2d 6, 8 (2nd Cir. 1965); United States v. Guglielmini, 384 F. 2d 602 (2nd Cir. 1967).

Although there are no "magic words" for a trial court to ritualistically recite in order to insure an adequate and correct explanation of the term "reasonable doubt", there are certain terms that have consistently been used by trial courts, and have continuously been approved and recommended by appellate courts, as correctly and clearly conveying the meaning of that term. Other terms and phrases which have sometimes been used to explain reasonable doubt have consistently been criticized, by this and other appellate courts, as being erroneous, misleading and confusing. When those erroneous explanations are charged, thereby giving a jury a false or misleading impression of the meaning of reasonable doubt, the error

is reversible.

Some of the improper explanations of reasonable doubt that have often been held to have been improper are that beyond a reasonable doubt means proof of guilt to a "moral certainty" (United States v. Byrd, 352 F. 2d 570, 575 (2nd Cir. 1965); United States v. Hart, 407 F. 2d 1087, 1091 (2nd Cir. 1969); United States v. Biloti, 380 F. 2d 649, 654 (2nd Cir. 1967); that proof beyond a reasonable doubt is established if a reasonably prudent person would be "willing to act" upon it (Holland v. United States, 348 U.S. 121, 141 (1954); Scurry v. United States, 347 F. 2d 468, 469 (D.C. Cir. 1965); United States v. Biloti, supra; United States v. Richardson, 504 F. 2d 357 (5th Cir. 1974); that a reasonable doubt means a "substantial doubt"; and that proof beyond a reasonable doubt means that the juror is left with an "abiding conviction" of guilt (United States v. Bridges, 499 F. 2d 179 (7th Cir. 1974); United States v. Atkins, 487 F. 2d 257 (8th Cir. 1973); United States v. Barrera, 486 F. 2d 333, 339 (2nd Cir. 1973). Furthermore, instructing a jury that reasonable doubt is not an "excuse to avoid performance of a duty", or that reasonable doubt does not mean proof to the exclusion of "all possible doubt" have been criticized for placing the court "in the position of urging a verdict with more emphasis than is appropriate". United States v. Andrews, 347 F. 2d 207, 212 (6th Cir. 1965); United States v. Bridges, supra, 499 F. 2d at 186; cf. United States v. Shaffner, 524 F. 2d 1021, 1023 (7th Cir. 1975).

Courts have explained time and time again why the phrases referred to are prejudicially erroneous to a defendant. By calling a reasonable

doubt a "substantial doubt" or one failing to leave an "abiding conviction" of guilt, the jury is told that the doubt must be something other than "reasonable". Defining reasonable doubt in terms of "moral certainty" implies that some means other than reason may be employed to arrive at a conclusion, causing "more confusion than light". United States v. Acarino, 408 F. 2d 512, 517 (2nd Cir. 1969); United States v. Johnson, 343 F. 2d 5, 6 (2nd Cir. 1965). And the "willing to act upon" language, which also has consistently been criticized, adds to the confusion injected by the prior definitions, by injecting a standard not covered by "reasonable doubt". (See Scurry v. United States, supra, 347 F. 2d at 470.)

In contrast to the variety of phrases and definitions which have been rejected for use in explaining reasonable doubt, there is one explanation that has consistently been condoned and recommended. That language is the nearly universally accepted explanation defining reasonable doubt as being a doubt which would cause an ordinary, prudent person to hesitate and pause to act in life's important transactions. Holland v. United States, supra, 348 U.S. 121 (1954); United States v. Richardson, 504 F. 2d 357 (5th Cir. 1974); United States v. Acarino, supra, 408 F. 2d 512, 517 (2nd Cir. 1969); United States v. Hart, supra, 407 F. 2d 1087, 1091 (2nd Cir. 1969); United States v. Biloti, supra, 380 F. 2d 649, 654 (2nd Cir. 1967). Again and again appellate courts have expressed their opinions that the "hesitate to act" language is the proper explanation of reasonable doubt.

In the instant case, the trial judge employed almost all of the proscribed definitions of reasonable doubt in its attempt to explain the

concept to the jury. The Court told the jury that reasonable doubt is a "substantial doubt" (4045), and that it is of such a nature as to leave an "abiding conviction" of guilt, amounting to a "moral certainty" (4045). The Trial Court then went on to repeat that if after a fair and impartial consideration of the evidence there was an

> "abiding conviction of guilt which amounts to a moral certainty --- I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own private lives --- then you have no reasonable doubt. . . . " (Emphasis added) (4046).

The trial judge thereafter concluded his charge concerning reasonable doubt in even more language criticized by appellate courts, by telling the jury that reasonable doubt

> " . . . is not an excuse to avoid the performance of an unpleasant duty" (T 4045); and that "If the rule were you had to be satisfied beyond all reasonable doubt few men, however guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any contraverted fact which by its very nature is not susceptible of mathematical certainty."
> (T 4046). See, United States v. Andrews, supra, 347 F. 2d at 212; United States v. Bridges, supra, 499 F. 2d at 186; United States v. Shaffner, supra, 524 F. 2d at 1023 (7th Cir. 1975).

It appears that the only language not used by the trial court to explain reasonable doubt was the proper "hesitate to act" instruction. That was the language requested by the government in its requests to charge (Request No. 29) as well as by the defense (DeLutro's Request to Charge No. 29) (3675, 4046), and therefore the Court was aware that the litigant's position was that other language was inappropriate.

The vague, misleading and confusing charge as to reasonable doubt was especially prejudicial to the appellant, Richard Bolella. The only testimony against him was the testimony of Mario Perna and Anthony Verzino that he met with the former once and with the latter a few times. There was absolutely no physical evidence or other testimony in the case that could possibly tend to corroborate the witnesses' word. Nor was there any testimony that Richard Bolella ever participated in any narcotic transaction during the course of the conspiracy. The closeness of the case against Richard Bolella is evident by the fact that the jury had not yet arrived at a verdict charging him with two substantive counts (Counts Two and Three) at the time that they announced their guilty verdicts as to the other counts after approximately thirty hours of deliberation. Under these circumstances, it was especially important that the court's charge on reasonable doubt be clear and correct. Had the appropriate instructions been given, the jury may very well have found reasonable doubt as to the appellant Richard Bolella's guilt.

Furthermore, the failure to instruct the jury in appropriate language is a significant error, and not merely a "quibbling attack on the 'reasonable doubt' charge" (United States v. Hughes, 389 F. 2d 535, 537 (2nd Cir. 1968), because as this Court has recognized in United States v. Guglielmini, supra, 384 F. 2d at 607:

> " It may well be that appellate courts have come to place too much reliance on the use of certain words in instructing juries about

> reasonable doubt. But we do not know how experienced and sophisticated each of the jurors may be in these matters; and we can never know just what words or thoughts are remembered and become the guides which weigh most heaviiy in the jury's deliberations."

Since the language instructing the jury concerning reasonable doubt was misleading, confusing and incorrect, the judgment should be reversed.

POINT VI

THE COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES ON THE APPELLANT ON HIS CONVICTION FOR CONSPIRACY AND THE SUBSTANTIVE CRIME.

The appellant Richard Bolella was convicted by jury of conspiracy (21 U.S.C. 846) and distribution of a Schedule I narcotic drug controlled substance (21 U.S.C. 841(a)(1). On December 3, 1975 he was sentenced to ten years' imprisonment on Count One, conspiracy, and ten years' imprisonment on Count Four, distribution of a Schedule I narcotic drug controlled substance, with the sentences to run consecutively to each other. This was error. Bell v. United States, 349 U.S. 81 (1955); Ladner v. United States, 358 U.S. 169 (1958); Prince v. United States, 352 U.S. 322 (1957).

The crime of conspiracy as set forth in 21 U.S.C. 846 has no separate penalty clause, having been incorporated into the section of the federal narcotics law dealing with attempts, and was enacted solely to ensure that one who sets out to violate the federal narcotics law either alone or with others and fell short of achieving his or her goal, might still have engaged in conduct which is detrimental to society and against which the law must protect. Congress by the enactment of 21 U.S.C. 846 desired that the narcotics law should cover all violations, both consummated and attempted, either alone or with others, created a danger to society sufficient to call forth measures for society's protection. Congress did not intend to allow the pyradmiding of penalties.

Although there is a sizeable amount of legislative history for the Drug Abuse Prevention and Control Act of 1970, only a small part of it concerns itself with 21 U.S.C. 846, and its sentencing provisions, but the little that exists is very revealing about the intent of Congress on the scope of punishment that is available to the Court for violation of the Act's provisions.

The Bill that was finally enacted into law as the Drug Abuse Prevention and Control Act of 1970 was House Bill H. R. 18583*. The legislation's first two subchapters was initially passed upon by the House Committee on Interstate and Foreign Commerce, and during the House debate on the measure, a member of the House Committee on Interstate and Foreign Commerce, the Hon. Donald G. Brotzman, a member of the House from the State of Colorado, discussed the scope of sentencing in the following remarks:

> "Mr. Brotzman . . . penalties correspond to the schedules so that stiffer sentences may be imposed where more serious drug violations are involved. Persons who illegally manufacture, distribute or dispense the hard narcotics listed in Schedules I and II would be liable to serve prison terms of up to 15 years and pay fines of up to $25,000. . . . " (91 Cong. Rec. 3365).

Representative Brotzman's remarks as to the scope of sentence available to the Court should be accorded great weight, for prior to taking up his duties as a member of the House of Representatives he was the United States Attorney for the District of Colorado, and he had, while occupying that position, first-hand experience with sentences and the scope

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* See 70 U.S. Code Congressional and Administrative News, p. 4566.

of punishment.

Other members of the House also expressed themselves along similar lines in discussing the scope of punishment available under House Bill H. R. 18583. The Hon. Lawrence J. Hogan, a member of the House from the State of Maryland, and a former Special Agent with the Federal Bureau of Investigation, stated the following:

> " Mr. Hogan . . . Manufacture or distribution of illicit drugs is punishable by up to 15 years in prison in the case of Schedule I or II narcotic drugs . . . "
> (91 Cong. Rep. 33656).

The Hon. George Bush,* a member of the House of Representatives from the State of Texas, stated:

> " Mr. Bush . . . As far as trafficking in drugs, penalties vary according to the substance. An offender who deals in the more dangerous items like heroin will face up to 15 years in prison and a $25,000 fine, all of which is doubled for a second offender. . . "
> (91 Cong. Rec. 33314)

These remarks by members of the House of Representatives clearly indicate that the congressional intent was to limit, for a first offender, the range of punishment up to a term of fifteen years' imprisonment and an $25,000 fine. Congress intended, as the remarks of members of both the House and Senate show, that penalties were only to by pyramided for those who had been previously convicted of a violation of the Federal Narcotics law, or those who violated those provisions of the law set forth in 21 U.S.C. 848; defining a continuing

* Now the Director of the Central Intelligence Agency.

criminal enterprise.

The member of the House from the State of Colorado, the Hon. Donald G. Brotzman, stated:

> " Mr. Brotzman . . . the bill provides that where an individual engages in a continuing criminal enterprise involving a continuing series of violations undertaken by him, in concert with five or more other persons and from which he derives substantial income, he is punishable by a mandatory minimum sentence of not less than 10 years and up to life imprisonment, together with a fine of up to $100,000 and forfeiture to the United States of all the profits derived from the enterprise."
> (91 Cong. Rec. 33651).

These comments were echoed in the United States Senate in the remarks of the Hon. Roman L. Hruska, Senior Senator from the State of Nebraska, who made the following remarks:

> " Mr Hruska . . . Harsh penalties are leveled against the person who trafficks in drugs as part of a continuing criminal enterprise . . . Second and subsequent offenses will generally be punishable by up to twice the penalty provided for first offenses."
> (91 Cong. Rec. 1664)

Congress, as an examination of the statute shows, in the Drug Abuse Prevention and Control Act of 1970, drafted a law which limits the scope of punishment to those who deal in Schedule I or II narcotic drug controlled substances to a term of imprisonment of 15 years. The penalties only increase as to those who are either second offenders, or

who are found guilty of engaging in a continuing criminal enterprise (21 U.S.C. 848) or who are sentenced as a Dangerous Special Drug Offender (21 U.S.C. 849).

Laws are not drafted in a vacuum, and while Congress was debating the Drug Abuse Prevention and Control Act in September and October of 1970, it was also considering the Final Report of the National Commission on Reform of Federal Criminal Laws which presented its Proposed New Federal Criminal Code in January, 1971. The Proposed New Federal Criminal Code included among its commission members the Hon. Roman L. Hruska and the Hon. Richard H. Poff, Junior Senator from Virginia, both of whom did extensive work on the Drug Abuse Prevention and Control Act. The former United States Attorney for the Southern District of New York was an advisory committee member of the National Commission. The commission makes it crystal clear in their report that cumulative punishments would not be imposed for conviction of a conspiracy and the included substantive crime. There is none, nor can there be, a realistic belief that these committee members, intimately connected with the drafting of both pieces of legislation, and the problems and considerations involved in sentencing in criminal matters intended to take one position on concurrent sentences in the Proposed New Federal Criminal Code, and a totally contrary position in the Drug Abuse Prevention and Control Act. Certainly there is nothing in the legislative history to support such a contention. Included among the Sections of their final report is Section

3204 which states:

> " Section 3204 - Concurrent and consecutive terms of imprisonment . . . (2) Multiple sentences. A defendant may not be sentenced consecutively for more than one offense to the extent ---
> . . . (b) One offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other . . . "
> (A 214)

The comments as set forth in the Proposed New Federal Criminal Code spell this out in explicit language.

> " Section 1004 - Criminal Conspiracy . . . Comment Para. 4 . . . . The Code treats conspiracy, however as a series of multi-party attempts; the grading is comparable to that provided for attempt and, as is provided for attempt, under 3204 one cannot be sentenced consecutively for conspiracy and the substantive crime." (A 215)

Where the legislative history and background spell out clearly that Congress did not intent that a first offender, who stands convicted of conspiracy and one substantive count, be subjected to cumulative punishments. The judgment of conviction should be reversed and the case remanded to the District Court with appropriate instructions for resentencing.

POINT VII

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE APPELLANT BOLELLA HEREBY ADOPTS BY REFERENCE THE POINTS AND ARGUMENTS OF THE OTHER APPELLANTS INSOFAR AS THEY MAY HAVE APPLICATION TO THE APPELLANT BOLELLA.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed and the case remanded to the District Court with a direction that the appellant be granted a new trial or in the alternative that the case be remanded to the District Court with a direction that the appellant be resentenced.

Respectfully submitted,

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EPSTEIN USA v. Magnano (Bolella)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 22 day of March, 1976 at No. 1 St. Andrews Pl. NYC deponent served the within Brief upon U.S. Atty. So. Dist. of NY 3 the Appelee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 22 day of March 19 76

.....
Edward Bailey

.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976